

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 79 w/CS Communication Services

SPONSOR(S): Mack

TIED BILLS: **IDEN./SIM. BILLS:** SB 1078

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Telecommunications (Sub)	6 Y, 0 N	Holt	Liepshutz
2) Business Regulations	31 Y, 0 N w/CS	Holt	Liepshutz
3) Judiciary		Havlicak	Havlicak
4) Public Safety Appropriations (Sub)			
5) Appropriations			

SUMMARY ANALYSIS

Current law provides for civil and criminal prosecutions of unauthorized reception of cable television services. This bill updates that law by providing penalties for theft of the many new types of communication services, except telephonic, being provided through advances in technology. The bill increases the penalty from a first degree misdemeanor to a third degree felony when private financial gain is the motivation for unauthorized interception or receipt of communications services or when assisting others to intercept or receive services unlawfully. The bill specifies that the possession of each unlawful device shall constitute a separate offense and requires the court to impose a fine for each device and each day of violation.

In criminal cases, the bill requires the court to impose restitution upon a convicted defendant and authorizes the court to forfeit any communication devices in the defendant's possession or control which were used in the criminal activity.

Additionally, the bill amends the provisions of current law related to civil actions for the recovery of actual or statutory damages for economic injury to aggrieved parties. The bill creates authority for the court to order impoundment, destruction, or remedial modification of illegal devices. The bill also raises the minimum statutory damages recoverable for violations committed for commercial advantage and also makes violations committed for private financial gain subject to the same higher statutory damages.

Lastly, the bill provides exemptions to any state or local governmental entity, law enforcement agency, or any provider of communications services when lawfully acting in accordance with any other state or federal law.

The bill takes effect October 1, 2003.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0079.ju.doc
DATE: March 31, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

The broad expansion of criminal and civil sanctions in s. 812.15 may not support the principle of less government.

B. EFFECT OF PROPOSED CHANGES:

This bill amends s. 812.15, F.S., which currently provides both civil and criminal penalties for the theft of cable communications services when a person without authorization intercepts or receives cable signals or assists another to do so through the manufacture or distribution of equipment designed for that purpose. The bill updates the section by expanding the existing definitions, and by creating new definitions, in order to cover, not only cable communications services, but the many new technologies that communication service providers, except telephone, are now offering to the public. The bill also amends the definitions to describe the many new technological devices and types of equipment being used to receive and intercept communication services without authorization.

Furthermore, the definitions and the elements of the criminal offenses are modified to describe and incorporate the means by which people illegally obtain communication services and the various methods employed by manufacturers and distributors to market their products (devices). Finally, those offenses which punish the mere possession of a device or number of devices are amended so that culpable knowledge may be established by showing either that the person knew that the devices were designed to receive communication services illegally or by showing that the individual knew the devices were designed for "assisting others in committing a violation."

The bill increases the current penalty from a first degree misdemeanor to a third degree felony whenever private financial gain is the motive for illegally receiving or intercepting communication services, or for assisting others to do so by manufacturing or distributing equipment intended for such purpose. Similarly, the penalty is raised, in like fashion, whenever private financial gain is the motive for placing advertisements promoting the sale of such devices.¹

In regard to the imposition of criminal penalties for the unlawful possession of a communications device, the bill specifies each device shall constitute a separate violation and a fine shall be imposed for each device and each day of violation.

The bill requires the court to order restitution upon a defendant convicted of violating s. 812.15, F.S. It also authorizes the court, upon a defendant's conviction, to forfeit any communication devices in the defendant's possession or control which were used in the criminal activity.

¹ Sections 775.082 and 775.083, F.S., list maximum imprisonment and fines for criminal convictions as:

- 1st degree misdemeanors: imprisonment not exceeding 1 year and a \$1,000 fine; and
- 3rd degree felonies: imprisonment not exceeding 5 years and a \$5,000 fine.

The bill addresses the issue of venue in a criminal prosecution. It provides that venue lies where the devices were manufactured or assembled, used to assist others to violate the statute, or sold or delivered to a person.

The bill also amends civil provisions within s. 812.15, F.S.; specifically authorizing aggrieved persons to bring civil actions for damages and allowing courts to order the impoundment, destruction, or remedial modification of communications devices involved in the illegal activity. Further, the bill creates a new provision defining actual damages to include the retail value of the services the violator received or the retail value of the services that others who were supplied the devices were capable of receiving. Proof that the devices were actually used by others to obtain communication services is specifically not required under the bill.

Currently, in lieu of actual damages, a claimant may receive an award of statutory damages. The bill amends the law to allow the claimant to elect statutory damages at any time before the court enters final judgment and raises the minimum amount recoverable from \$250 to \$1500. In addition, statutory damages of up to \$50,000, which are currently recoverable, in the court's discretion, for willful violations that are committed for the purpose of gaining commercial advantage, will now become recoverable under the bill when violations are committed for private financial gain. The bill allows the court to impose statutory damages assessed for each illegal device and for each day of violation.

Finally, the bill excludes from its provisions any provider of communications services, state or local law enforcement or governmental entity when lawfully acting in accordance with any other state or federal law.

The bill takes effect October 1, 2003.

C. SECTION DIRECTORY:

Section 1: Amends s. 812.15, F.S. relating to unauthorized reception of cable services.

Section 2: Provides an effective date of October 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See "fiscal comments" below.

2. Expenditures:

See "fiscal comments" below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the Florida Cable Telecommunications Association, it is estimated that the theft of services provided by Florida's franchised cable television operators alone approaches some \$340 million per year in lost revenue, which translates into a loss to the State in Communications Services Tax revenue of over \$31 million with a corresponding loss to local governments across the state as well.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference will review this bill at its April 4, 2003 meeting. The Office of Economic & Demographic Research has preliminarily reviewed the bill and anticipate that the Conference will find that HB 79 will have an insignificant impact on the need for prison beds. This is based in part on the fact that for the fiscal year 2001-02, there were only 2 individuals convicted under the current law found in s. 812.15, F.S., and neither of those two received a sentence requiring imprisonment.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring expenditure of funds.

2. Other:

Unlawful Delegation

Article II, s. 3, Fla. Const. provides: "No person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Florida Supreme Court has ruled that this separation-of-powers provision prevents the Legislature from delegating legislative power.² The power to legislate is defined as "involv[ing] the exercise of discretion as to the content of the law, its policy, or what it shall be[.]"³

Since the Legislature may not delegate its powers to other branches of state government, one would conclude, *a fortiori*, that it may not delegate them to private persons, either.⁴ However, the Florida Supreme Court has not directly addressed this question; however, in the one case where the Supreme Court of the United States struck down a federal statute solely on non-delegation grounds, the statute was held unconstitutional for, among other reasons, doing precisely this.⁵ Given that Florida's non-delegation doctrine is considerably stricter,⁶ one would expect the same result under Florida law. The phrase, "unless specifically authorized to do so by a cable provider or other communications service provider" appears to delegate to private parties the authority to determine what acts do or do not constitute a crime; especially combined with the criminal rule of lenity, this may be an unconstitutional delegation of legislative power.

² See *Avatar Development Corp. v. State*, 723 So.2d 199 (Fla. 1998); *Board of Architecture v. Wasserman*, 377 So.2d 653 (1979).

³ *State ex rel. Taylor v. City of Tallahassee*, 177 So. 719, 720-21 (Fla. 1937). See also *B. H. v. State*, 645 So.2d 987 (Fla. 1994); *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260 (Fla. 1991).

⁴ See 10 Fla. Jur. 2d Constitutional Law § 192 (stating this as a "general rule").

⁵ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁶ See *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978) (holding that the state constitution's explicit separation of powers provision imposes a stronger non-delegation doctrine on the Legislature than the federal constitution does on Congress).

In addition, the Legislature may not proactively adopt in advance or otherwise attempt to incorporate federal law that is not yet enacted, because this would be a delegation of its legislative power to the federal government.⁷ The phrase “or as may otherwise be specifically authorized by law” appears to be an attempt to do this and, as such, may also be an unconstitutional delegation of legislative power.

Federal Preemption

Under the Supremacy Clause of the federal constitution,⁸ state law may be preempted by federal law under three circumstances: where Congress has clearly expressed an intent to do so; where it is clear, despite the absence of preemptive language, that Congress intended, by comprehensive legislation, to so occupy an entire field of regulation as to leave no room to be supplemented by state law; or when state law frustrates the full achievement of Congressional intent.⁹ Moreover, if validly adopted, federal administrative regulations have no less preemptive force than Congressional statutes.¹⁰

Under the Communications Act of 1934,¹¹ the Federal Communications Commission (“FCC”) has extremely broad authority to regulate all forms of communication.¹² Indeed, the FCC has repeatedly stated that it has the authority to preempt state and local regulation in this area as it sees fit.¹³ Although the Cable Communications Policy Act of 1984¹⁴ specifically allows for state or local enfranchisement of cable providers, the FCC retains the authority to preempt any state or local regulation in furtherance of Congress’s stated policy of ensuring that interstate communication remains a uniform field throughout the country.¹⁵ At a minimum, this may mean that all the provisions of this bill are subject to preemption by the FCC at any time; arguably, it may mean many if not all of its provisions are invalid due to federal occupation of the field.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 11, 2003, the Subcommittee on Telecommunications adopted three amendments. The changes remove the word “telephonic” from the definition of the word “communications services,” and remove the word “telephone” from the definition of the word “communications service provider” for the purposes of s. 812.15, F.S. Also the word “deployment” is added to the circumstances under which an individual is considered assisting others in committing the unlawful acts described in the section. Finally, exemptions from the provisions of the bill are provided for any governmental entities or any provider of communications services when lawfully acting in accordance with any other state or federal law. Those three subcommittee

⁷ See *State v. Welch*, 279 So.2d 11 (Fla. 1973); *Brazil v. Division of Administration*, 347 So.2d 755 (Fla. 1st DCA 1977).

⁸ Art. VI, cl. 2, U.S. Const.

⁹ See *Capital Cities Cable Corp. v. Crisp*, 467 U.S. 691, 698-99 (1984) and authorities cited therein.

¹⁰ See *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982).

¹¹ Title 47 U.S.C. § 152 et seq.

¹² See *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

¹³ See e.g., *In re Community Cable TV, Inc.*, 95 F.C.C.2d 1204 (1983); *Duplicative and Excessive Over-Regulation-CATV*, 54 F.C.C.2d 855 (1975).

¹⁴ Title 47 U.S.C. §§ 521-59.

¹⁵ See *City of New York v. F.C.C.*, 486 U.S. 57 (1988).

amendments were adopted by the full Business Regulation Committee on March 18, 2003, and were incorporated into the bill which was then reported favorably with CS.